

February 3, 2005

Civil Division - New Castle County

**By U.S. Mail**

Councilman Patrick J. Cahill  
555 Kates Way  
Smyrna, DE 19977

**Re: Freedom of Information Act Complaint  
Against the Town of Smryna**

Dear Council Member Cahill:

On October 27, 2004 this office received your letter alleging that the Town of Smyrna ("the Town") violated the open meeting requirements of the Freedom of Information Act, 29 *Del. C.* Chapter 100 ("FOIA"). You allege specifically that: (1) on September 28, 2004 a quorum of the Town Council met without notice to the public to discuss your alleged "disruptive behavior" and pursuit of a "personal agenda" during Council meetings; (2) the September 28, 2004 meeting occurred without a posted agenda and no minutes were kept; (3) public business was conducted at this meeting resulting in a letter produced on Town stationery and addressed to you concerning your alleged misconduct; and, (4) on October 6, 2004, the Town Manager and the Director of Planning and Inspections began to conduct a public hearing on a proposed boat and RV storage ordinance without either appropriate notice to the public or an agenda.

By letter dated October 29, 2004, this office requested the Town's response, which was received on November 18, 2004.<sup>1</sup> According to the Town, the event held on October 6, 2004 was not a "meeting" of a "public body" as defined by FOIA. The event was a public workshop conducted by employees and staff of the Town. The workshop was intended only to seek input from the public on the subject of boat and RV storage in preparation for drafting a proposed ordinance. No ordinance had been drafted at this point. The Town contends that FOIA was not applicable to this event.

Regarding the letter dated September 28, 2004, the Town contends that there was no "meeting" held to formulate the letter, and the number of people involved does not constitute a quorum of the Town Council. The Town states that the letter was drafted by one individual and expressed her personal concerns with a fellow Council member. Her subsequent communications with other members of the Town Council were intended only to determine if she was alone in her opinion. The Town contends that the letter was "not significantly different" from having three individual letters from the Council members. The Town's final contention is that there was no deliberate or intentional effort to circumvent the open meeting provision of FOIA.

Following this office's review of the complaint and response, additional information was requested by letter to the Town Solicitor dated December 2, 2004. The Town responded on December 14, 2004.

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<sup>1</sup> The Town's response included a letter from the Town Solicitor with attachments consisting of affidavits from D. Sue Hensley, William W. Hill, Memphis Evans and Stephen J. Lee.

### Relevant Statutes

FOIA requires that “[e]very meeting of all public bodies shall be open to the public except those closed” for executive session as authorized by statute. 29 *Del. C.* § 10004(a). FOIA also requires all public bodies to “give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof. The notice shall include the agenda....” 29 *Del. C.* § 10004(e)(2).

FOIA defines a “public body” in very broad terms to include municipal government entities, including their committees and subcommittees, which (among other defining factors), are “impliedly or specifically charged by any other public official, body or agency to advise or make reports, investigation or recommendations.” 29 *Del. C.* § 10002(c).

FOIA defines a “meeting” as “the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business.” 29 *Del. C.* § 10002(b).

### Legal Analysis

#### A. October 6, 2004 Workshop

We have previously determined that the open meeting requirements of FOIA apply “not only to gatherings where a public body takes formal action, but also to a ‘workshop.’” Att’y Gen. Op. 04-IB18 (Oct. 18, 2004) (quoting Att’y Gen. Op. 02-IB07 (Mar. 22, 2002)). “The open meeting law applies to ‘fact gathering, deliberations, and discussions, all of which surely influence the public entity’s final decision.’” Id.

You acknowledge, however, that the workshop did not go forward because of your FOIA compliance concerns. Since no “meeting” took place, there could not be a FOIA violation. Moreover, the workshop was noticed and posted in accordance with FOIA for October 27, 2004. Any alleged violation resulting from the October 6, 2004 workshop was cured as a result of the subsequent notice and posting.

B. September 28, 2004 Letter

In her affidavit of November 12, 2004, Council Member Sue Hensley states that she drafted the letter but did not send it immediately because she “was interested in seeing if [she] was the only one concerned ... with [Council Member] Cahill’s conduct.” She then telephoned, and subsequently met with, Council Member Memphis Evans regarding the letter. In her affidavit she states that “[h]e read the letter, said that he agreed with its content, and signed it.”<sup>2</sup> Five days thereafter (on September 20, 2004), Council Member Hensley spoke with Council Member William Hill immediately following the regularly scheduled Town Council meeting. She showed him the letter, and he “shared with [her] his own frustration with Mr. Cahill’s conduct....” He then signed the letter.<sup>3</sup> On September 23<sup>rd</sup>, Council Member Hensley approached Council Member Temple Carter immediately following a Town Council meeting. She showed him the letter (now bearing signatures from three Council Members), he read it, and “said that he agreed with its content, but stated that he did not want to sign the letter.” The following day, Council Member Hensley telephoned Council Member Rick Burritt and faxed him a copy of the letter. While he also shared a lot of her concerns,

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<sup>2</sup> In a separate affidavit, Council Member Evans corroborates this recitation of the contact.

<sup>3</sup> In a separate affidavit, Council Member Hill corroborates this recitation of the contact.

“he did not feel it was appropriate for any member of Council to tell any other member of Council how to conduct himself, and he declined to sign the letter.”

In all, Council Member Hensley contacted four (4) other members of the Town Council and solicited their responses to the content of the letter. Those members commented on the letter during their contacts with Council Member Hensley, and following their comments, two of the four Council members chose to be signatories to the letter along with her. In response to this FOIA complaint, the Town acknowledges that by meeting with the Council members individually, Council Member Hensley’s contacts could be viewed as an attempt to circumvent the open meeting provision of FOIA. It posits that our office should view this conduct as Council Member Hensley’s expression of her personal concerns and her efforts to “test” the validity of her own personal concerns against the opinions of other Council members....”

Based upon the information gathered from this investigation, this office concludes that the Smyrna Town Council violated the open meeting requirements of FOIA by holding a meeting to discuss a matter of public business without notice to the public.

In *Att’y Gen. Op. 04-IB17* (Oct. 18, 2004), this office determined that the county council violated the open meeting requirement of FOIA when one councilman circulated a written proposal to allocate county funds and then contacted three of the seven members of the council by telephone to solicit their views. We determined that, in combination, these facts amounted to a “meeting” of a quorum of the council because “there was an active exchange of information and opinions” during the telephone calls and not just a “passive receipt of information”, and a “consensus” was reached.

In *Att’y Gen. Op.* 04-IB17, we noted that “the circulation of written materials among the members of a public body prior to a public meeting does not violate FOIA so long as there is no interactive discussion of the materials.” In this case, the record shows that there was an interactive discussion of the letter drafted by Council Member Hensley with four of the other members of the Council. A total of five Council members (a quorum) reviewed, discussed and decided whether or not to sign a letter to be delivered to another member of the Council. These contacts were more than the passive receipt of information. Council Member Hensley may have formulated the letter itself, however, by contacting other members of the Town Council, she solicited their opinions, and in deciding whether to become signatories to the letter, the other members took a position on a matter of public business: your alleged misconduct. We determine that the sum of those communications amounted to a meeting of a public body covered by FOIA.

C. Remediation

Based on the facts presented, we do not believe that any remediation is necessary. In contrast to *Att’y Gen. Op.* 03-IB17 (July 31, 2003), the action taken by the five members of the Town Council in preparing the letter of September 28, 2004 did not result in the impairment of the substantial right to vote by removing an elected official from office. The letter has been finalized, sent, and is now a matter of public record. No purpose would be served at this point in requiring the Council to re-notice a meeting to discuss the letter. No doubt the contents of that letter will be the subject of spirited public debate in the future at meetings noticed to the public as required by FOIA.

Conclusion

For the foregoing reasons, this office determines that the Town did not violate the open meeting requirements of FOIA by holding a “workshop” without the required notice to the public. The “workshop” did not go forward after you raised FOIA concerns and thereafter was properly noticed to the public for a later date. We determine that the Town Council violated the open meeting requirement of FOIA by, in effect, holding a meeting outside of public view and without notice to the public in the course of drafting and commenting on a letter to you dated September 28, 2004.

We do not believe that remediation is necessary for that FOIA violation because the document is now a matter of public record and no purpose would be served in having it re-drafted and sent after a public meeting. The Town Council is cautioned to strictly comply with the open meeting requirements of FOIA in the future.

Very truly yours,

Kevin R. Slattery  
Deputy Attorney General

APPROVED:

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Malcolm S. Cobin, Esquire  
State Solicitor

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XC. The Honorable M. Jane Brady  
Attorney General

John Terrence Jaywork, Esquire

W. Michael Tupman, Esquire  
Deputy Attorney General

Lawrence W. Lewis, Esquire  
Deputy Attorney General

Philip G. Johnson  
Opinion Coordinator

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